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Supreme Court, U.S.
FILED

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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

WILLIAM ROBINSON,

Petitioner,

v.

GLOBAL MARINE DRILLING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED*

Did the Petitioner's respiratory impairment of asbestosis qualify as a *disability* as defined under the Americans With Disabilities Act?

---

* The Plaintiff's correct last name is "Robison". His name was misspelled on the original complaint, however, so the case is styled "Robinson".

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William Robinson respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REFERENCES TO OPINIONS

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published by order of the Fifth Circuit dated November 25, 1996. It is reprinted in Appendix A hereto ("App. A") at page A-1.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1996. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations at issue here are reproduced in pertinent part within the contents of this Petition:

(1) 42 U.S.C. §12102(2)

(2) 29 C.F.R. §1630.2(h)(1)

(3) 29 C.F.R. §1630.2(i)

(4) 29 C.F.R. §1630(j)(1)

(5) 29 C.F.R. §1630.2(j)(2)

(6) 29 C.F.R. §1630.2(j)

STATEMENT OF THE CASE

Until his layoff in August, 1992, Robinson had been employed for ten (10) years by Global Marine as a rig mechanic or rig engineer. From January 24, 1991, until August 18, 1992, Robinson worked as a rig engineer on the *Adriatic IV*, a Global Marine drill ship working off the coast of Sicily in the Mediterranean Sea. When the *Adriatic IV* lost its contract with Global Marine's client in August of 1992, there was no more work available in the Mediterranean, and the rig was taken out of service and stacked. Robinson, along with most of the rig's crew was laid off when the rig was stacked.

Robinson admitted at trial that his layoff was prompted by economic considerations and was not the result of discrimination by Global Marine. Thus, the issue for resolution at trial was not the reason for Robinson's layoff, but the reason why he was not recalled for work. Robinson asserts that he was not recalled because he was fifty-two (52) years of age and had been diagnosed with asbestosis.

At trial, Mike McLean testified as an adverse witness. McLean is employed by Global Marine in its personnel department as manager of international manpower and

travel services and was the Global Marine employee primarily responsible for attempting to find employment for Robinson in the Global Marine fleet. McLean testified at trial that following Robinson's layoff in August, 1992, that positions did become available for rig mechanics and rig engineers within the Global Marine work force; and that notwithstanding his efforts, McLean was unable to place Robinson on any Global Marine rigs. Seventeen rig engineer vacancies were in fact filled during the two years after Robinson's layoff.

In presenting evidence of discrimination at trial, Robinson relied on the fact that he was fifty-two (52) years old at the time of his layoff; the fact that he had been diagnosed as having asbestosis and that his asbestosis impairment was a part of the records of Global Marine (App. 8-9); and his employment record. It is undisputed that Robinson's personnel file reflected well above average performance reports, the successful completion of a number of training courses, an excellence award, and a master's license issued by the Coast Guard.

Without objection, Robinson testified that his asbestosis condition was confirmed by no less than six (6) different doctors. He further testified that he informed his front line supervisors, *i.e.*, tool pushers and rig managers every time he reported for work as to his asbestosis condition. Robinson specifically named James Sehon, Roger Burch, Owen King, Billy Cannon and his last supervisor, Charles Streidel. Streidel, who was also Robinson's last supervisor, was aware that the Veterans Administration was sending Robinson to University Medical Center in Jackson and Pensacola Lung Group for

test in May or June, 1992 due to the continued deterioration of his breathing capacity. Robinson also testified, without objection, that at the time of his layoff in August, 1992, his asbestosis condition had forced him to sustain a reduced breathing/lung capacity of fifty percent (50%); and that he was experiencing serious breathing problems when climbing ladders between decks on the *Adriatic IV.*

Petitioner began this litigation by filing suit in the United States District Court for the Southern District of Texas, Houston Division alleging that the failure on the part of Global Marine to recall him for work was in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621-634 (Cum. Supp. 1995) and the Americans With Disabilities Act, 42 U.S.C. §12101-12213 (Cum. Supp. 1995). The case was called to trial by the Honorable Ewing Werlein, Jr., on July 7, 1995. Global Marine moved for judgment as a matter of law at the close of the Plaintiff's case and again at the close of all of the evidence. Both motions were overruled.

Nine interrogatories were submitted to the jury. The jury found that age was not a determining factor in Global Marine's failure to recall and reassign Robinson to work (Interrogatory No. 1); that Robinson was a qualified with a disability (No. 3); that Robinson's disability was a determining factor in the decision not to recall him to work (No. 4); and that Robinson was entitled to recover $49,000.00 for back pay (No. 5), $31,000.00 as liquidated damages (No. 6), and $50,000.00 for punitive damages (No. 9). The jury awarded Robinson nothing for front pay (No. 7) or compensatory damages (No. 8). The answer to Interrogatory No. 6, liquidated damages, was predicated on an affirmative answer to Interrogatory No. 2 which

was in turn predicated on an affirmative answer to Interrogatory No. 1. Because the first interrogatory was answered negatively, the second was not answered. However, the jury did answer question No. 6 and in so doing, awarded liquidated damages in the sum of $31,000.00. The trial court accordingly sustained Global Marine's objection to a judgment awarding liquidated damages and signed a judgment for $99,000.00.

Global Marine renewed its motion for judgment as a matter of law and, alternatively, moved for new trial. Robinson filed a motion asking for an award of attorney's fees and costs. The trial court overruled Global Marine's motion with respect liability under the ADA, granted that portion of Global Marine's motion for judgment relating to punitive damages, and ruled, alternatively, that Global Marine was entitled to a new trial on the issue of punitive damages. The court granted in part Robinson's motion for attorney's fees and costs. Final judgment was signed October 3, 1995, and entered October 4, 1995. Global Marine filed a Notice of Appeal on October 20, 1995 and Robinson filed a Notice of Cross-Appeal on October 31, 1995.

A unanimous panel of the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and rendered a take-nothing judgment in favor of Global Marine. In reaching its decision, the Fifth Circuit panel held that even though the facts in the case demonstrated a history of an *impairment*, there was no evidence of a history of a *disability*. Because of the narrow ruling by the Fifth Circuit on the question of *disability*, this Petitioner will limit his arguments to that issue alone.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE STATUTORY AND REGULATORY LANGUAGE IN DEFINING WHAT IS A DISABILITY UNDER THE AMERICANS WITH DISABILITY ACT.

The Petition should be granted because the decision below is inconsistent with the statutory definition and regulatory guidelines of what is a *disability* for purposes of the ADA.

To be sure, a plaintiff may indirectly prove that he was discriminated against because of a disability by using the *prima facie* case and burden shifting methods that originated in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which were refined and sharpened in *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). In order to establish a claim for illegal discrimination under the ADA, a plaintiff must prove that (1) he has a disability; (2) he was qualified for the job; and (3) an adverse employment decision was made because of his disability. With respect to an individual, a *disability* under the ADA is defined as follows:

> (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such an impairment.

42 U.S.C. §12102(2).

A *physical impairment* is "[a]ny physiological disorder, or condition. . . . " 29 C.F.R. §1630.2(h)(1) (1995). *Major life activities* are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, *breathing*, learning, and working." 29 C.F.R. §1630.2(i). (Emphasis added) *Substantially limited* is defined as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. §1630.2(j)(1).

Factors to be considered in assessing whether an individual is substantially limited in a major life activity are:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §1630.2(j)(2).

As with any statute, the appropriate starting point for analysis is the plain language of the statute itself. "We must give effect to this plain language unless there is

good reason to believe Congress intended the language to have some more restricted meaning." *Shaw v. Delta Airlines*, 463 U.S. 85, 97 (1983). Further, the Supreme Court has long recognized that an agency's interpretation of a statute it is entrusted to administer should be given "considerable weight" and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843 (1994).

The Fifth Circuit panel decision acknowledges that Robinson suffered from asbestosis and that his asbestosis was an *impairment* and that "the issue is whether his impairment substantially limits a major life activity, thereby becoming a disability." (App. 5). However, this interpretation of the statute defining the term *disability* is inconsistent with the plain language of the statutory definition and regulatory interpretation.

42 U.S.C. §12102(2) provides three separate and distinct ways a disability may be proven in the *alternative* under the ADA. Thus, Robinson can prove his disability under the ADA by showing a physical or mental impairment that substantially limits one or more of his major life activities, *e.g.* breathing; *or* that he has a record of an impairment of breathing as a result of asbestosis; *or* that he is regarded as having an impairment of asbestosis. The facts are uncontradicted that Global Marine had as a part of its company records, documented information that Robinson was being treated for asbestosis (App. 6); that his asbestosis condition was confirmed by no less than six doctors; that his supervisors to whom he reported were aware of his asbestosis condition; that his last supervisor

was aware he was being sent by the Veterans Administration to the University Medical Center in Jackson and Pensacola Lung Group for tests in May or June of 1992 due to the continued deterioration of his breathing capacity; that at the time of his layoff in August, 1992, his asbestos condition had forced him to sustain a reduced breathing/lung capacity of fifty percent (50%); and that he was experiencing serious breathing problems when climbing ladders between decks on the *Adriatic IV*. Such record of an impairment clearly fits the definition of a disability pursuant to 42 U.S.C. §12102(2)(B) and should therefore be afforded its "plain language" as directed in the *Shaw* decision. The Fifth Circuit's additional requirement that the impairment must also limit a major life activity is a heavier burden than Congress intended by the plain wording of the statute. Since the Fifth Circuit panel noted that the personnel file on Robinson maintained by Global Marine noted his asbestosis condition, and that said condition has been recorded as such by Global Marine, Robinson is *disabled* pursuant to the plain language of the statute. The Fifth Circuit's additional requirement that Robinson demonstrate an impairment which substantially limits a major life activity is simply unnecessary and redundant.

Notwithstanding the foregoing, assuming *arguendo* that a *disability* under the ADA must always involve "a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . . ", the trial record clearly demonstrates that the major life activity of *breathing* has been substantially limited. Robinson's uncontradicted testimony at trial was

that at the time of his layoff in August, 1992, his asbestosis condition had forced him to sustain a reduced breathing/lung capacity of fifty percent (50%). The Fifth Circuit panel's decision makes note of the fact that "Robinson offered no medical expert testimony" to support his opinion of his reduced breathing/lung capacity. (App. 6). However, nowhere in the regulations or in the statute is there any requirement that a plaintiff must present medical evidence to substantiate an ADA claim. In this respect, the Fifth Circuit panel decision is contrary to the appendix to the applicable federal regulations which provides that "an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a major life activity as compared to the average person in the general population's ability to perform that same major life activity." 29 C.F.R. App. §1630.2(j) (1996). It cannot be seriously argued that a fifty percent (50%) reduction in an individual's breathing/lung capacity is not a substantial limitation to the major life activity of breathing.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-20888

WILLIAM ROBINSON,

Plaintiff-Appellee Cross-Appellant,

VERSUS

GLOBAL MARINE DRILLING COMPANY,

Defendant-appellant Cross-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Nov. 25, 1996)

Before RENALDO G. GARZA, JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

William Robison[1] a worker with asbestosis, filed this Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), case against his employer, Global Marine Drilling Company, claiming that he was not rehired because of his disability. While the evidence shows that Robison had an impairment, the evidence is insufficient to prove

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[1] The plaintiff's correct last name is "Robison." His name was misspelled on the original complaint, however, so the case is styled "Robinson."

that his asbestosis substantially limited a major life function. Thus Robison's impairment does not rise to the level of a disability under the ADA. Accordingly, we reverse the district court's denial of judgment as a matter of law and render a take-nothing judgment in favor of Global Marine.

BACKGROUND

William Robison worked for Global Marine for ten years as a rig mechanic and rig engineer. In 1992 he was a rig engineer on the *Adriatic IV*, a Global Marine drill ship working off the coast of Sicily in the Mediterranean Sea. In August 1992, the *Adriatic IV* lost its contract and, because there was no work available in the Mediterranean, the rig was taken out of service and stacked. Robison, along with most of the crew, was laid off when the rig was stacked. Robison admits that his layoff was caused by economic considerations and not by discrimination.

After the layoff, Robison's name was placed on a list of Global Marine employees eligible to be recalled. This list was circulated throughout Global Marine's fleet for review by rig managers who had vacancies to fill on their rigs. Each Global Marine rig manager had the authority to hire employees for the rigs he supervised. All other crewmen of the *Adriatic IV* who had been laid off were hired back. After the vessel was stacked, Global Marine had 20-25 openings for which Robison was qualified. Nonetheless, Robison was never hired back by Global Marine.

In 1986, Robison had been diagnosed with asbestosis, a progressive and often fatal condition of the lungs. Robison was "up front" about his diagnosis and always notified his tool pusher, who was his supervisor on the rig, about his condition. In addition, his personnel file at Global Marine contained a reference to his pulmonary problems. Due to his asbestosis, Robison's lung capacity was less than 50% of normal and he had shortness of breath while climbing ladders on the *Adriatic IV*.

Robison filed suit against Global Marine, alleging violations of the ADA and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). The jury found for Robison on his ADA claim, but against him on his ADEA claim. The jury awarded him $49,000 for back pay, $31,000 as liquidated damages and $50,000 for punitive damages. Liquidated damages are not recoverable under the ADA and the interrogatory concerning them was predicated on finding liability under the ADEA. The district court, therefore, disregarded the answer to that interrogatory and did not award the $31,000 to the Robison. The district court also found that punitive damages were not warranted and reduced Robison's award by $50,000.

Global Marine filed a motion for judgment as a matter of law as to Robison's ADA claim, which the district court denied.

DISCUSSION

In reviewing a denial of a motion for judgment as a matter of law we employ:

> [T]he same standards as the district court to determine whether sufficient evidence exists to support the jury verdict. . . . "If the facts and inferences point so strongly and overwhelmingly in favor of one party that it would be unreasonable for jurors to arrive at a contrary verdict," the motion for judgment should be granted.

Leatherwood v. Houston Post Co., 59 F.3d 533, 535-36 (5th Cir. 1995) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

To establish a claim for discrimination under the ADA, a plaintiff must prove that: (1) he has a disability; (2) he was qualified for the job; and (3) an adverse employment decision was made because of his disability. *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996). Global Marine argues that Robison fails on the first prong of his case. While Robison had asbestosis, Global Marine contends that he was not disabled under the ADA and thus was not entitled to ADA protection.

> A disability under the ADA is:
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The EEOC's regulations define "major life activities" as "functions such as caring for

oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (emphasis added). An individual is "substantially limit[ed]" if he is:

> (i) unable to perform a major life activity that the average person and the general population can perform; or
>
> (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(J)(1).

The evidence establishes that Robison's asbestosis was an "impairment." 29 C.F.R. § 1630.2(h)(1) (regulations define impairment as a physiological disorder or condition affecting, *inter alia*, the respiratory system). Thus, the issue is whether his impairment substantially limits a major life activity, thereby becoming a disability. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 189-90 (5th Cir. 1996).

The only problem Robison experienced from his asbestosis was a few instances of shortness of breath wile climbing stairs.[2] As noted above, breathing is a major life

---

[2] Robison also testified that his lung capacity was less than 50% of normal. While this may be evidence of an impairment, the fact of a lower lung capacity is not evidence of a disability. Other than the shortness of breath while climbing, Robison introduced no evidence purporting to show how this lower lung

activity, while "[c]limbing is not such a basic, necessary function and this court does not consider it to qualify as a major life activity under the ADA." *Rogers v. Int'l Marine Terminals, Inc.*, 87 F.3d 755, 758 n.2 (5th Cir. 1996). Several instances of shortness of breath when climbing stairs do not rise to the level of *substantially* limiting the major life activity of breathing. It is important to note that Robison offered no medical expert testimony. The only evidence regarding his asbestosis and its effects came from the plaintiff himself.

Robison can also fall under the ADA's protection if there is evidence that he had a record of disability or was regarded as disabled. 42 U.S.C. § 12102(2)(B) & (C). There was testimony at trial that Robison told his supervisors of his asbestosis and that the personnel file Global Marine kept on him noted his condition. While these facts are evidence of a history of an *impairment*, they are not evidence of a history of a *disability*. There is no evidence in the record that Robison had a history of, or was regarded as, having an impairment which substantially limits a major life function.[3]

---

capacity "significantly restricted [him] as to the condition, manner or duration under which [he could breathe] as compared to the condition, manner, or duration under which the average person in the general population can [breathe]." 29 C.F.R. § 1630.2(J)(1)(II).

[3] "Regarded as having such an impairment" means that the individual:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

CONCLUSION

Robison is not disabled. He does have asbestosis, but that impairment does not substantially limit his major life activity of breathing. Because Robison failed to prove that he is disabled, the evidence is insufficient to sustain the jury verdict on his ADA claim. The district court erred in denying Global Marine's motion for judgment as a matter of law on Robison's ADA cause of action. Accordingly, we REVERSE the judgment of the district court and RENDER a take-nothing judgment in favor of Global Marine.[4]

> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in . . . [29 C.F.R. § 1630(h)] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1)(1)-(3); *Dutcher v. Ingalls Shipbuilding;* 53 F.3d 723, 727-28 n.19 (5th Cir. 1995).

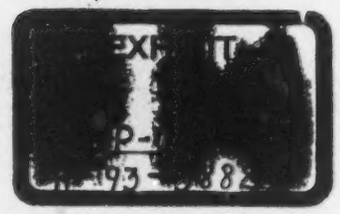
[4] Robison cross-appealed, arguing that the district court erred in reversing the punitive damages award and in denying certain costs. Because we find no liability, we need not consider the punitive damages and costs issues.

*** GLOBAL MARINE *** G R E E N S root

PAGE: 1 DATE: 04-21-1994

SSN : 461-58-5361
INSURED : ROBISON,WILLIAM J
ADDRESS : 4400 ROCK CREEK RD
:
: MOSS POINT, MS 39563-5550
D.O.B : 03-22-41 AGE: 53 DOH: 05-17-82

SUBGROUP# : GMC.35 GLOBAL MARINE DRILLIN
COV TYPE : 01 HEALTH GMC 12-01-92 * TERMINATED *
IND PD TO DTE : GRP PD DTE: 05-17-82 05 MEDICAL
CLAIM# : 004140
PATIENT : ROBISON, WILLIAM J
D.O.B : 03-22-41 AGE: 53
REL : 1 SEX: M
DEP EFF DTE: DEP TERM DTE:



DETAIL OF PREVIOUS TRANSACTIONS

DP	IX	PROVIDER	P	DATES-OF-SERVICE		CHARGES	PD-STATUS	BE	CT	ONSET	REL-TO	ICD.9	DIAGNOSIS
1	*	PENSACOLA LUNG GROUP	O	03-11-92	03-11-92	206.00	0.00	IE	IL			501	ASBESTOSIS
2		PENSACOLA LUNG GROUP	P	03-11-92	03-11-92	-206.00	-164.80	IR	FROM: 111765T		TO: 162405		
3		PENSACOLA LUNG GROUP	O			0.00	V	IE					
		STUART T GUTTMSN MD	P	12-02-91	12-02-91	230.00	184.00	IE	IL			511	PLEURISY
		PENSACOLA LUNG GROUP	P	03-11-92	03-11-92	206.00	164.80	IE	IL			501	ASBESTOSIS
		SINGING RIVER HOSPIT	P	01-28-92	01-28-92	1111.65	889.32	IE	SU			7011	KERATODERMA, ACQUIRED
		SINGING RIVER RADIOL	P	01-27-92	01-27-92	21.00	16.80	IE	IL			2104	BENIGN NEOPLASM OF OTHER AND UNSPE
8		DR HARRY E BURROW JR	P	01-30-92	01-30-92	250.00	40.00	IE	SU			2104	BENIGN NEOPLASM OF OTHER AND UNSPE
9		PRESCRIPTION DRUGS	O	12-02-91	12-02-91	-230.00	0.00	IE	IL				STATEMENT
10		PRESCRIPTION DRUGS	I	05-10-91	10-17-91	180.44	144.34	IE	IL			4619	ACUTE SINUSITIS, UNSPECIFIED
11		PRESCRIPTION DRUGS	O	12-02-91	12-02-91	230.00	0.00	IE	IL				STATEMENT
12		STUART T GUTTMSN MD	P	12-04-91	12-04-91	344.90	260.72	IE	IL			496	CHRONIC AIRWAY OBSTRUCTION, NOT EL
13		SINGING RIVER HOSPIT	O	05-08-91	05-08-91	131.00	0.00	IE	AP		87750	V709	UNSPECIFIED GENERAL MEDICAL EXAMIN
14		BAUNHAUER DONALD & G	O	05-08-91	05-10-91	50.00	0.00	IE	AP			V709	UNSPECIFIED GENERAL MEDICAL EXAMIN

IX	INELIG	EXCESS	COB SAV	OI PAID	INT SAV	COIN	DEDUCT	RECEIVED	ACTION	TRNS ID	F	REEL*FRAME	REEL*FRAME	EOB SEQ
1	0.00	0.00	164.80	206.00	0.00	41.20	0.00	02-08-94	02-09-94	162405		149*99.2	2448*0.3555	# 156356
2	0.00	0.00	0.00	0.00	0.00	-41.20	0.00	02-08-94	02-08-94	1117651		149*99.2		104211
3	0.00	0.00	0.00	0.00	0.00	0.00	0.00	03-24-92		112025		149*158.18		
4	0.00	0.00	0.00	0.00	0.00	46.00	0.00	03-23-92	03-26-92	111893		149*126.57		104182
5	0.00	0.00	0.00	0.00	0.00	41.20	0.00	03-23-92	02-08-94	111765		149*99.2		104211
6	0.00	0.00	0.00	0.00	0.00	222.33	0.00	03-17-92	03-21-92	111368		149*12.102	2014*0.6325	# 103775
7	0.00	0.00	0.00	0.00	0.00	4.20	0.00	02-17-92	02-24-92	108911		146*35.2	1099*0.843	# 101231
8	0.00	0.00	0.00	0.00	0.00	10.00	200.00	02-11-92	07-14-92	108569		145*153.51	1096*0.476	# 112829
9	-230.00	0.00	0.00	0.00	0.00	0.00	0.00	01-10-92	01-10-92	105265C		141*241.3		
10	0.00	0.00	0.00	0.00	0.00	36.10	0.00	01-10-92	01-13-92	105807	Y	141*241.4		97624
	230.00	0.00	0.00	0.00	0.00	0.00	0.00	01-08-92	01-10-92	105265		141*241.3		
	0.00	0.00	0.00	0.00	0.00	65.18	19.00	12-19-91	12-26-91	104060	Y	140*148.21	1062*0.2635	# 96202
	0.00	0.00	0.00	0.00	0.00	0.00	131.00	05-22-91	05-28-91	87751	Y	123*116.21	939*0.1	78971
	0.00	0.00	0.00	0.00	0.00	0.00	50.00	05-22-91	05-28-91	87750	Y	123*116.19	939*0.1	78971

PATIENT	CLAIM#	YEAR: 94 CRYFWD	DEDUCT	HSP.DED	COINS	YEAR: 93 CRYFWD	DEDUCT	HSP.DED	COINS	YEAR: 92 CRYFWD	DEDUCT	HSP.DED	COINS
WILLIAM J	0041.0	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	200.00	0.00	277.73
FAMILY-3		0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	400.00	0.00	828.29
NANCY	0041.1	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	200.00	0.00	550.56
ERIC	0041.2	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

OTHER INSURANCE: COB STATUS: PRIMARY SPOUSE DOB: COB YRS: 92 LAST CLAIM FORM:

*** GLOBAL MARINE *** G R E E N S root

PAGE: 2 DATE: 04-21-1994

SSN	: 461-58-5361	SUBGROUP#	: GMC.35 GLOBAL MARINE DRILLIN			
INSURED	: ROBISON,WILLIAM J	COV TYPE	: 01 HEALTH	GMC	12-01-92	* TERMINATED *
ADDRESS	: 4400 ROCK CREEK RD	IND PD TO DTE	: GRP PD DTE:		05-17-82 D5	MEDICAL
	:	CLAIM#	: 004140			
	: MOSS POINT, MS 39563-5550	PATIENT	: ROBISON, WILLIAM J			
D.O.B	: 03-22-41 AGE: 53 DOH: 05-17-82	D.O.B	: 03-22-41 AGE: 53			
		REL	: 1 SEX: M			
		DEP EFF DTE:	DEP TERM DTE:			

FAMILY MESSAGES

****DO NOT CHANGE ADDRESS---INSURED CALLED SON ALSO WORKS FOR GMC WE KEEP CHANGING ADDRESS TO SON'S****P O BOX 8425---ZIP 39562
SS#428354727*****.**********ADDRESS SHOULD BE 4400 ROCK CREEK DR
39563**********.********** 01-21-92 DH

PATIENT MESSAGES

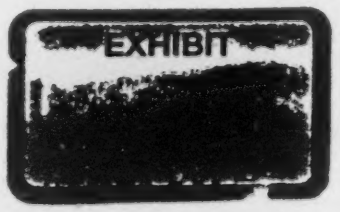
**** ILLIAM*** I CALLED DR GUTTMAN'S OFFICE REQUESTING AN ITEMIZED BILL FOR THE 12.02.91 SERVICE DATE TOTALLING
$2. .00********** EY WILL FORWARD TO MY ATTENTION. 03-11-92 DH

WILLIAM SENT NOTE TO CRISTI CONCERNING TRACER ON DRAFT #050571 FOR $40.00 ISSUED 02.19.92 TO DR BURROW********** 04-20-92 DH

PER LETTER FROM GMC - STOP PAYMENT WAS PLACED ON DRAFT 05071-0001 DATED 02-19-92 IN THE AMOUNT OF 40.00 PAYABLE TO DR. BURROW. DRAFT RE-ISSUED TODAY. LETTER AT MFA 159*228.2. 07-14-92 BB

JOEWORK RELATED INJURY TO STOMACH MUSCLES 01-01-93. 03-26-93 CM EN < < B

DOING TRANSFER ON 111765, RECD DRAFT FROM PROV $164.80 STATING "V.A. HAS PAID" SENDING DRAFT TO CRISTI AT GMC. 02-08-94 PC



Supreme Court, U.S.
FILED
APR 18 1997
CLERK

No. 96-1328

In The

Supreme Court of the United States

October Term, 1996

WILLIAM J. ROBINSON,

Petitioner,

vs.

GLOBAL MARINE DRILLING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT HAYDEN BURNS
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QUESTION PRESENTED

Did Petitioner prove that he was disabled for purposes of the Americans With Disabilities Act?

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STATEMENT OF THE CASE

The court of appeals reviewed Robison's[1/] evidence and found that it was insufficient to prove that he was disabled for purposes of the Americans With Disabilities Act (''ADA'') 42 U.S.C.A. §§ 12101-12213 (West 1996). The court properly did so even though the evidence was undisputed that Robison was diagnosed with asbestosis before he was laid off by Global Marine and that a record of the diagnosis was maintained in the Global Marine insurance department. These undisputed facts were not sufficient to prove disability because there must also be evidence that the diagnosed condition adversely impacts major life activities. No such evidence was received at trial.

The absence from the record of any evidence of disability is compounded by the affirmative evidence that Robison was not disabled. He never asked Global Marine to accommodate his physical condition. He premised his entire case on the theory that he was an excellent worker who could perform whatever task was required on the drilling rig no matter how difficult it might have been. After his layoff from Global Marine, Robison continued to work at physically demanding jobs in a boiler factory, a shipyard, and at another offshore drilling company without requesting an accommodation from those employers. Robison testified on two separate occasions at trial that his asbestosis had not ''manifested'' itself, once insisted that he was ''fine,'' and stated that his condition was a problem for the future. Robison also admitted that he had passed several Coast Guard physical examinations required for his

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1/ Petitioner's actual name. The improper spelling of Petitioner's name in his Complaint has been carried forward in the style of the case.

master and able-bodied seaman's licenses and had successfully completed firefighting school without any problems from asbestosis.

Presenting no expert medical testimony about his physical condition, Robison offered his lay opinion that his lung capacity was less than 50% of normal. He did not, however, relate the purported reduction in lung capacity to any limits on his activities. When asked about breathing difficulties, Robison testified that "just one time over there in Sicily" he was short of breath after climbing several ladders from the lower deck to the main deck of his drill ship.[2/] There was no evidence connecting this incident to Robison's asbestosis rather than to his seventeen years as a cigarette smoker.

It is not true, as Robison suggests, that he was being sent to hospitals before his layoff because of his deteriorating physical condition. Robison testified that the Veterans' Administration was sending him to hospitals to evaluate his claim for a veteran's disability pension. That claim had been pending at the time of trial for more than three years without the approval of the V. A.

Robison failed to mention that the undisputed evidence established that his insurance records were kept in a separate department at Global Marine and were never disclosed to the rig managers, who were the only persons authorized to fill vacancies on Global Marine rigs, or to the Global Marine personnel department. Robison even admitted that he never informed the personnel department or any rig manager other than Charles

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2/ Robison later testified that climbing ladders had on other, unspecified, occasions made him short of breath.

Streidel about his diagnosis. There was no evidence that the diagnosis was known to any person with hiring authority other than Streidel.

When Robison disclosed his condition to Streidel, he did not suggest that the diagnosis limited his activities. Instead, Robison said, "When and if the V. A. ever puts me at 50%, I'm going to go long term disability. I mean, I'm fine, don't misunderstand me. This stuff has not manifested."

Robison also failed to mention in his Petition that the majority of the Global Marine jobs that he could have filled after his layoff were in the Gulf of Mexico on rigs managed by Lynn Coleman. Coleman testified that he regarded Robison's work to be mediocre and would not have him on his rigs. Robison disputed Coleman's assessment of his work but testified that there was bad blood between him and Coleman resulting from an incident where Robison criticized Coleman to one of Coleman's supervisors. No one contradicted Coleman's testimony that he was unaware of Robison's asbestosis diagnosis.

REASONS FOR DENYING THE WRIT

The court of appeals, in its decision below, held that Robison had failed to prove that he was disabled. The evidence that Robison had been diagnosed with asbestosis was insufficient to prove that the illness substantially limited a major life activity, that Robison had a history of being so limited, or that Robison was regarded as being substantially limited in a major life activity. Petitioner ignores the language of the statute, the applicable regulations, and the decided cases when he argues that the court below improperly

insisted on evidence of a connection between his diagnosis and a substantial limitation on a major life activity.

The ADA defines the word "disability" in terms of substantial limits on major life activities. Thus, for purposes of the Act, a disability is:

(A) a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual;

(B) a record of *such* an impairment; or

(C) being regarded as having *such* an impairment.

42 U.S.C.A. § 12102(2) (West 1995) (emphasis supplied). The adjective "such" is used in subparts (B) and (C) to refer to impairments substantially limiting an individual's major life activities as specified by subpart (A).

Although Congress did not define the term "substantially limits" in the ADA, the Equal Employment Opportunity Commission has done so in language that reveals the difference between an existing medical condition and a disability. The Commission has defined the term to mean:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (1996). The Commission defines "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996). In its interpreta-

tive regulations, the Commission noted that the question of whether an individual is disabled must be answered on a case-by-case basis because:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments . . . .
>
> . . . Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder; the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630 app. at 339 (1996).

The courts of appeal have consistently held that evidence of a physical condition, impairment, or illness is insufficient to prove disability under either the ADA or the Rehabilitation Act (29 U.S.C.A. §§ 701-797b (West 1985 & Supp. 1997) because there must also be proof that the condition, impairment, or illness substantially limits a major life activity.[3/] *E.g., Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 911 (11th Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454-55 (7th Cir. 1995); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994); *Diaz v. United States Postal Service*, 658 F. Supp. 484, 491-92 (E.D. Cal. 1987). Those plaintiffs who assert that they are disabled because of a

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3/ The definition of "disability" in the ADA (42 U.S.C.A. § 12102(2) (West 1995)) is substantially equivalent to the definitions of "handicapped individual," "individual with handicaps," or "individual with disabilities" which have appeared in the various versions of the Rehabilitation Act (29 U.S.C.A. § 706 (West 1985 & Supp. 1997)).

record of a disability or because they are regarded as disabled must connect the employment record or the work-place perception to a substantial limitation of a major life activity. *E.g.*, *Gordon*, 100 F.3d at 913-915; *Dutcher*, 53 F.3d at 727-29; *Hamm v. Runyon*, 51 F.3d 721, 725-26 (7th Cir. 1995).

As required by the language of the ADA, the Commission's implementing regulations, and judicial precedent, the court below searched the record for evidence that Robison was substantially limited as to a major life activity, that there was a record that Robison was so limited, or that Robison was regarded as having such a limitation. The court could find no such evidence. All Robison had to offer on the issue was his testimony that he was occasionally short of breath after climbing several flights of ladders on the drill ship. That testimony did not show that Robison was disabled. Breathlessness after vigorous physical exertion is, after all, a condition that affects everyone, including Olympic athletes. Although Robison's diagnosis was recorded in Global Marine's insurance department, no Global Marine record even hinted that Robison's ability to breathe or to carry out any other life activity was limited. Similarly, there was no evidence that any of the persons Robison told about his asbestosis regarded that condition to be a substantial limitation on any of his activities.

CONCLUSION

Robison was a plaintiff who had a physical condition, asbestosis. Because he never linked that condition to a limitation on a major life activity, he never proved that the condition was a disability. That failure of proof made it unnecessary for the court below to consider whether Robison proved that the failure to recall him to work was in any way related to his physical condition. Robison proved neither disability nor discrimination at trial, and his Petition should be denied.

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